

No 75.

given in a case not dissimilar to the present. *Harcarse*, 16th December 1682, Thomson *contra* Anderson, No 80. p. 9736.

Answered; No act of behaviour as heir can be conceived more complete than that in question, done not only in the character but under the appellation of heir-at-law; l. 20. *D. De acquirend. vel. amittend. hæred.* Stair, B. 3. T. 6.; Bankt. B. 3. T. 6.; Ersk. B. 3. T. 8. § 82. Nor is there any room for the defender's plea of favour, in opposition to a passive title so salutary in guarding against the fraud of heirs. The law should act with a constant and regular operation, giving in all cases a settled effect to settled principles, however individuals may happen to be affected; nor, in truth, is any thing more favourable than a due and steady application of the same law to all cases falling under it. If this be departed from, a *jus vagum et incertum* will be introduced, under which no man can know to what he should trust; and it is better that one man should suffer by his own inattention or fault, than that the law, and through it the security of the whole subjects, should be injured. Accordingly heirs are held to be liable, even where there is not the least suspicion of intromission; Stair, July 1672, Foulis *contra* Forbes, No 59. p. 9711.; July 2. 1743, Hutchison *contra* Menzies, No 66. p. 9722.; HERITABLE AND MOVEABLE, Sect. 28.; Ersk. B. 3. T. 8. § 84.; Bankt. B. 3. T. 5. § 102. Nor is the case quoted from *Harcarse* different; for the defence there was, that the debt had not been discharged. At the same time it is to be observed, that James could have no occasion for a claim of relief against the L. 60 security, because it was only *quoad* the excess of the debts beyond that part of the disponer's estate, that the disposition to James was reducible at the suit of creditors.

The Lord Ordinary again repelled the defence; and the defender reclaimed to the Court, when it was

Observed on the Bench; As the Court, in the case of Maitland of Pitrichie, No 70. p. 9730.; in that of the Creditors of Ayton, No 74. p. 9732.; and in other instances, have given relief against an actual service, when there was no intention to represent; so, *a fortiori*, is that indulgence due here, where the claim is laid on the mere appearance of *gestio pro hærede*.

The COURT altered the Lord Ordinary's interlocutor, and "sustained the defence against the passive title of *gestio pro hærede*."

Lord Ordinary, *Alva*, Act. *M. Ross*. Alt. *Lord Advocat.* Clerk, *Gordon*.
S. *Fol. Dic. v. 4. p. 41. Fac. Col. No 56. p. 98.*

1791. May 13.

No 76.

Where the
intromissions
of the heir
have been

The CREDITORS of BRYCE, WILLIAM, and GEORGE BLAIRS, *against* DAVID BLAIR.

AFTER the death of Bryce Blair, and his two sons William and George, who were proprietors of certain lands in the county of Dumfries, David Blair, their

apparent heir, executed a deed, conveying the whole subjects to trustees, with powers to manage them, and also to sell what part was necessary for discharging the debts.

David Blair afterwards made up inventories with a view of entering heir *cum beneficio*, in virtue of the act 1695, chap. 24. His trustees also let a part of the lands, and for several years uplifted the rents; and they likewise sold some small parcels of land; but the sales were afterwards given up, the trustees not being in a situation to grant the necessary conveyances.

At last, after an interval of ten years, a process of ranking and sale was brought by the creditors, and David Blair claimed a considerable sum as due to him; when an objection was stated, that, in consequence of the proceedings already mentioned, he had become liable *gestione pro hærede* for the debts of his predecessors; and therefore could not be allowed to enter into a competition with their creditors.

The question having been reported on informations, the Court were unanimously of opinion, that as, in those proceedings, David Blair had no view of appropriating the subjects, his purpose being that of discharging the debts due by his predecessors, no passive title had been incurred.

THE LORDS, therefore, "repelled the objection to the claim entered for David Blair, and remitted the cause to the Lord Ordinary."

Reporter, Lord Henderland. Act. Dean of Faculty. / Alt. Solicitor-General.
Clerk, Mitchelson.

C. Fol. Dic. v. 4. p. 42. Fac. Col. No 178. p. 361.

No 76.
with a view
of preserving
the effects,
no passive
title is incur-
red.

SECT. IX.

Apparent Heir paying his predecessor's Debts.

1628. January 26. COMMISSARY of DUNKELD against ABERCROMBY.

The voluntary payment of the father's debts makes not the payer to be heir.

Fol. Dic. v. 2. p. 32. Auchinleck, MS. p. 2.

No 77.

* * Durie's report of this case is No 38. p. 3502. voce DILIGENCE.